84-1199

No. 84-.....

Office-Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS,
CLERK

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAYNE KING MOORE, Petitioner

v.

STATE OF ALABAMA, Respondent

Petition for a Writ of Certiorari
To The Alabama Court of Criminal Appeals

JAYNE KING MOORE, pro se
Attorney for herself

P.O. BOX 5071
Montgomery, Alabama 36103
205 / 262-7381 (days)

QUESTIONS PRESENTED FOR REVIEW

I.

PRESENTENCE REPORT / DUE PROCESS

Did the failure of the Trial Court to allow correction of the false and defective Pre-sentence Report prejudice the Defendant, so as to deprive her of constitutional due process?

Can the sentence procedure satisfy the Due Process Clause,

(1) "if a sentence is based on misinformation", and

(2) the Defendant was deprived of "adequate time" to rebut, because

(3) the Defendant was shown "a copy of the pre-sentence report on the morning of the sentencing", and

(4) the "Sentencing court failed to respond to defendant's allegation that (the) pre-sentence report contained inaccurate information", and

(5) the Court "erred in at least failing to acknowledge the allegations of the defendant" in her MOTION TO VACATE SENTENCE, duly challenging at least 9

specific false and prejudicial statements, and

(6) the Court failed and refused to "exercise discretion" to correct the report or vacate the sentence "when called upon to do so", and when

(7) the Court "failed to insure fairness and accuracy"[1] ?

II.
FAILURE TO PROPERLY CHARGE THE JURY

The Court erred in refusing to give Defendant's requested instructions on the defense of "duress of coverture", based on the innocent wife to guilty husband relationship, thus depriving Defendant of an impartial jury trial, due process and equal protection, guaranteed by the Sixth and Fourteenth Amendments.

Was the Defendant deprived of her rights, when,

(1) The Trial Judge agreed in writing to charge that "mere presence" where drugs were found does not constitute criminal conduct, nor "constructive possession", but later

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[1] Quotes to later authority.

failed to charge the "same rule of law" "substantially and fairly" to the jury, and when

(2) The Trial Judge, well knowing Defendant's husband had been previously convicted for narcotics possession on the same evidence shown by the State, refused to instruct on "duress of coverture", and the husband-wife relationship, which were indispensible to the defense, and when

(3) The Alabama Court of Criminal Appeals held that Defendant's requested and refused charges were not "preserved for our review pursuant to **ALLEN v STATE** 414 So.2d 989 (Ala.Cr.App. 1981), affd., 414 So.2d 993 (Ala. 1982)"?

III.
JUDGMENT OF ACQUITTAL
NO PRIMA FACIE CASE

Was the Motion to Acquit for failure of the State make a prima facie case on illegal possession of drugs, based on circumstantial evidence, due to be granted, when

(1) There was no evidence but Defendant's proximity and non-exclusive residency at the premises where the drugs were found, and

(2) The State's case in chief allowed the conclusion to be drawn that it was the Defendant's husband, and not she, who was in "possession" of the illegal drugs seized, and the Court was obligated to apply the rule of law that if the State's case rests on circumstantial evidence it is necessary that the evidence shown exclude all rational conclusions except that of the defendant's guilt, and when

(3) There was no "substantial evidence" to provide an affirmative link beyond mere "constructive possession" to allow a legitimate inference of "guilty knowledge" and when

(4) A reasonable juryman could have good cause to doubt that Defendant was a possessor of the drugs, apart from her husband?

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In The
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October Term, 1984

NO. 84-.....

JAYNE KING MOORE, Petitioner

v.

STATE OF ALABAMA, Respondent

Petition for a Writ of Certiorari
To The Alabama Court of Criminal Appeals

Petitioner requests that a writ of certiorari issue to review the judgment of the Alabama Court of Criminal Appeals in this case, and the judgment of the Alabama Supreme Court in denying certiorari.

REPORTED OPINION BELOW

1. The Alabama Court of Criminal Appeals issued an OPINION on July 17, 1984, affirming the Judgment and Sentence of the Montgomery County, Alabama, Circuit Court, where the Defendant Jayne Moore had been convicted of illegal possession of "controlled substances", in violation of 1975 CODE OF ALABAMA, section 20-2-1 et seq. Rehearing and certiorari were denied in the Alabama system.

The OPINION of the Court of Appeals was duly reported, **Jayne King MOORE, alias v. STATE, 457 So.2d 981.**

JURISDICTIONAL STATEMENT

1. Certiorari was denied by the Alabama Supreme Court Oct. 19, 1984, with Petition for Certiorari due in this Court on or before Dec. 18, 1984. Petitioner applied for, and was granted an extension of time, until Jan. 17, 1985.

2. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1), and Article III,

Section 2, of the Constitution of the United States, involving federal and constitutional questions, decided in conflict with this Court, the Alabama Supreme Court and other State Courts of last resort.

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment Five pertinently states:

> "No person shall ... be deprived of life, liberty or property, without due process of law ..."

Amendment Six pertinently states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

Amendment Fourteen pertinently states:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

1975 CODE OF ALABAMA

Section 12-16-13 pertinently states:

> "Charges moved for by either party must

be in writing and must be given or refused in the terms in which they are written, and it is the duty of the judge to write "given" or "refused" as the case may be, on the document and sign his name thereto, which thereby becomes a part of the record. Charges which are marked "given" by the trial judge must be taken by the jury with them on retirement, and those "refused" must be retained by the clerk. ... The refusal of a charge, though a correct statement of the law, shall not be cause for a reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury ... In case of appeal, the charges must be set out in the record ... in the following manner ... (4) The charges refused to the appellant. Every general charge shall be in writing or be taken down by the court reporter as it is delivered to the jury."

Section 20-2-70 pertinently states:

"(a) Except as authorized ... any person who possesses ... controlled substances enumerated ... is guilty of a felony and, upon conviction, for the first offense may be imprisoned for not less than two nor more than 15 years and, in addition may be fined not more than $25,000.00 ..."

STATEMENT OF THE CASE

A.
Proceedings in the Courts Below

Defendant was charged by Grand Jury Indictment with three counts of "possession" of "controlled substances"; Cocaine, Diazepam, and Marijuana, with penalties prescribed by 1975 CODE OF

ALABAMA, 20-2-70.

Jury Trial was held in Montgomery County Circuit Court September 12, 1983.

During the State's case in chief, Defendant objected to all evidentiary items for lack of any requisite connection to the accused. Defendant showed that her husband had been separately convicted of "possession" of the same drugs, by the same evidence.

At the close of the State's case, Defense Attorney, Robert Cheek, moved for a verdict of acquittal; and for a directed verdict, and to exclude the State's evidence (R:153), which motions were summarily denied by the Court. A written ORDER (R:153) issued, setting out the rationale for the Court's denial.[1]

The defense case was based on "duress of coverture" under the husband-wife relationship, and the possibility of the

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[1] Bound in APPENDIX herein.

innocent spouse, in non-exclusive occupancy of the premises; and Counsel submitted requested jury instructions Numbers 2, 3 and 4, on that basis.

Before jury deliberations began, the Court agreed to charge Defendant's Requested Instruction NO.2 in substance, but later failed to do so.

The Court refused to give Defendant's Instructions NO.3 and NO.4, the essence of Jayne's legal defense, and the jury returned with a "guilty" verdict in less than 25 minutes. (R:195,197)

A pre-sentence investigation was ordered, (R:219) and sentencing was set for September 26th, when Attorney Cheek appeared and received a copy of the Pre-sentence Report for examination in the courtroom. His response to the preparer of the Report, in full hearing of the Court was: "Where did you get this

pack of lies?" (SR:21)[2]

Judge Phelps admonished Mr. Cheek (R:217), then heard some information from Cheek about the Defendant's mental state, and summarily sentenced the Defendant to ten years in the Penitentiary (R:222).

October 26th, 1983, Defendant timely filed her MOTION TO VACATE SENTENCE (R:224), seeking a hearing, and access to the "false and fraudulent" Pre-Sentence Report (R:225). She demanded correction of the Report, and a vacation of the sentence. The MOTION was ignored. No hearing was set.

A MEMORANDUM IN SUPPORT (R:242) was also duly filed, citing nine (9) specific falsehoods in the Report, as known to the Defendant. The content was ignored by the Court.

Defendant also timely filed a MOTION FOR A NEW TRIAL (R:226) citing extensive

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[2] SUPPLEMENTARY RECORD, page 21.

error, and raising, among other issues, REFUSAL TO GIVE DEFENDANT'S CHARGES (R:228) and FAILURE TO MAKE A PRIMA FACIE CASE (R:228), questions now before this Court.

The MOTION was supported by fact and law, in MEMORANDUM (R:230), but both were ignored by the Court until January 12, 1984, long after the Court had lost statutory jurisdiction on December 27, 1983.[3]

Defendant later filed her MOTION TO SUPPLEMENT/CORRECT THE RECORD on appeal, which was granted.

The substance of all QUESTIONS PRESENTED FOR REVIEW, raised herein, were duly raised before the Alabama Court of Criminal Appelas, where relief was denied, by OPINION of July 17, 1984.[4]

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[3] **ALABAMA RULES OF CRIMINAL PROCEDURE**, Temporary Rule 13(d), Feb. 23, 1980.

[4] **MOORE v STATE**, supra.

B.

Statement of the Facts

The "statement of facts" contained in the OPINION of **MOORE**, supra, omits any recognition of the Record portions showing the reasons for the Defendant's "heading toward the mobile home"(R:42,102,137). The raiding officers had shot her dog in the head (R:94), and had left the property gates open, allowing the cows to wander onto the roadway.

The "evidence" of residence was all hearsay, duly objected to, except for the direct "evidence" offered by Officer Rhegness. His statement "I recall asking her her name and if she lived there and she told me and affirmed 'yes' she lived there" (R:99) was denounced to the Trial Court as a perjury by Mrs. Moore. She moved (R:240) to set a hearing and try the perjury of Rhegness, but the hearing and Motion were denied.

Jayne Moore made no material statements to any of the Police Officers at any time. None of the trial evidence was directly connected to her. The State's witnesses unanimously admitted they had never seen her with any of the physical items of evidence in her possession, including the drugs. There was no evidence that even the "women's clothing" found in the trailer belonged to her.

The "facts" of the OPINION must be examined more for what they do not say, than what they affirmatively show.

"Proximity" and "non-exclusive possession" were shown; nothing else.

REASONS FOR GRANTING THE WRIT

The Alabama Supreme Court, a State Court of Last Resort has denied certiorari in Petitioner's case, and has, thereby, upheld an erroneous decision of the Alabama Court of Criminal Appeals. It was a decision on federal questions in

conflict with the United States Constitution; and in conflict with decisions of other State Courts of Last Resort and the opinions of this Court.

QUESTION
I.
PRESENTENCE REPORT / DUE PROCESS

Did the failure of the Trial Court to allow correction of the false and defective Pre-sentence Report prejudice the Defendant, so as to deprive her of constitutional due process?

Petitioner has cited seven specific sub-points as a part of the QUESTION I, and cites the following authority, on each sub-point, quoting from the full text of **HARVARD LAW REVIEW** Volume 93, Number 8, June 1980, entitled "DUE PROCESS AT SENTENCING ..." (SR:22 et seq.):[5]

> (1) "it is ... clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause ..." **GARDNER v FLORIDA** 430 U.S. 349 (1977).
>
> (2) "Defendant denied adequate time to

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[5] Record Supplement, page 22.

prepare and present a rebuttal" **UNITED STATES v ROBIN** 545 F.2d 775.

(3) "Defense Counsel requested (and was shown) a copy of the pre-sentence report on the morning of the sentencing. We held that the defendant lacked adequate opportunity to prepare a rebuttal and that defense counsel's well meant attempts to rebut at sentencing could not cure the defect." **UNITED STATES v ROSNER** 485 F.2d 1213 (CA2 1973)

(4) "Sentencing court failed to respond to defendant's allegation that (the) presentence report contained inaccurate information" **PEOPLE v MAJOR** Mich.App. 307 N.W.2d 451, 453.

(5) "Trial judge erred in at least failing to acknowledge the allegations of the defendant." **PEOPLE v MAJOR**, supra.

(6) "The failure to exercise discretion when called upon to do so is error" **UNITED STATES v ESPINOZ** 481 F.2d 553 (CA5, 1973)

(7) "Court failed to insure fairness and accuracy ... must be held to be plain error and an abuse of discretion" **UNITED STATES v ROBIN**, supra.
779.

The Trial Court was shown:

"in certain circumstances due process is violated if a sentence is based on misinformation" **TOWNSEND v BURKE** 334 U.S. 736 (1948).

The certified Record will show:

(a) Meaningful disclosure was denied by submission of the report at the

eleventh hour. (R:256, SR:20)

(b) Counsel disputed the truthfulness of the allegations at sentencing, styling the report "a pack of lies". (SR:21)

(c) The Trial Court reprimanded Counsel (SR:21), precluding him from a further challenge for the record. Counsel later submitted an AFFIDAVIT (SR:21), and MOTION TO SUPPLEMENT/CORRECT THE RECORD (SR:16), recording the facts and circumstances. The MOTION was granted (SR:19).

(d) Defendant duly filed her MOTION TO VACATE SENTENCE (R:224) with MEMORANDUM (R:242), attacking specific "false and prejudicial statements" (R:245), effectively "shifting to the prosecutor the burden of production on those allegations"[6] The MOTION was

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[6] **GEORGETOWN LAW JOURNAL** Vol. 66, 1515, 1529.

summarily denied (R:225), and Defendant has been continually denied meaningful access, to allow to correction of the Report.

(e) The Alabama Court of Criminal Appeals denied relief, claiming "there is nothing in the record which supports the claim of the appellant", in spite of the foregoing, and the Record proof described.

The Alabama Court of Criminal Appeals erred in holding there was no objection on the Record, and in failing to remand for a due process hearing and correction of the Pre-Sentence Report, with its "naked allegations".

See **GEORGETOWN LAW JOURNAL**, Vol. 66, 1515, 1529, 1530:

> "... if an assertion in the pre-sentence report consists of a **naked allegation without supporting facts**, a mere denial should be enough to shift to the prosecutor the burden of production regarding the allegation. Requiring the defendant to do more would force him to contest an allegation without knowing the information on which it rests. Unknown

> hearsay statements are not afforded prima facie value in any other area of the criminal justice system; a defendant in the sentencing context should therefore only be required to deny a **naked allegation** to fulfill his burden of production." (emphasis added)

The ORDER (R:255) denying Defendant's MOTION TO VACATE SENTENCE (R:224) without a hearing, is evidence of jurisdiction on the subject matter. The ORDER thus tacitly concedes that objections to the falsehoods in the Report were duly raised for the Record.

The Alabama Court of Appeals well knew, also, that Jayne Moore had legally challenged NINE SPECIFIC EXAMPLES of "falsehood, bias and misrepresentations", in the official Record at (R:245). They were:

"1. A sum of $21,000, which does not belong tc the Defendant, and which has no connection to her.

"2. A "street value" was affixed to the "drugs" seized, which bears no true relation to reality. The pretended value calculates 401.8 grams of simple sugar to sell for approximately $110.00 per gram or 3100.00 per ounce.

"3. Books found on the premises and names of

banks are not and cannot be material or "relevant" to any charge of "possessing drugs".

"4. A greenhouse and potting trays with the notation (marijuana?).[7]

"5. Claimed guilt by association with one "Luke Carswell"[8], who had allegedly "been selling drugs for some time", but who had not been accused or charged with any such offense.

"6. A false claim that Defendant had a connection with "marijuana on 3,000 acres of land".

"7. A false claim of a "recently harvested field of marijuana" connected with the Defendant, along with a "chainsaw used to harvest it".

"8. A false claim that Defendant was involved in "cleaning and producing mass quantities of marijuana".

"9. A false claim that the Defendant "commanded the dogs to attack the police", et cetera."

See **UNITED STATES v WESTON**, 448 F.2d 626, 634, where the Court held:

> "In **Townsend v Burke**, supra, the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A

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[7] When there was absolutely no sign or evidence of any marijuana in any potting trays, and no "greenhouse" on the premises.

[8] Deceased, not able to defend his name or reputation.

> rational penal system must have some concern for the **probable accuracy of the informational inputs** in the sentencing process". (emphasis added)

Petitioner respectfully asks: How much "probable accuracy of the informational inputs in the sentencing process" can be expected when the Alabama Courts fail and refuse to allow correction of the Pre-Sentence Report?

Petitioner prays that this Court will take jurisdiction on Certiorari; and duly remand to the Alabama Courts, with instructions for a plenary hearing on Defendant's original MOTION TO VACATE SENTENCE (R:224), thus protecting the Defendant's fundamental due process rights.

QUESTION II.
FAILURE TO PROPERLY CHARGE THE JURY

The Court erred in refusing to give Defendant's requested instructions on the defense of "duress of coverture", based on the innocent wife to guilty husband relationship, thus depriving Defendant of an impartial jury trial, due process, and equal protection, guaranteed by the Sixth and Fourteenth Amendments.

(1)

The Trial Judge agreed to include, in his general charge, that "mere presence" where drugs were found does not constitute criminal conduct, but he failed to do so.

Defendant's charge No.2 (R:220) in pertinent part was:

> "... if the jury find from the evidence that the conduct of the accused amounted to no more than being present where cocaine, marijuana and diazepam were possessed by her husband then the jury may presume that the cocaine, marijuana and diazepam were possessed solely by the husband and the jury may acquit the accused even if the jury find ... that the accused knew of the presence of cocaine, marijuana and diazepam at the given time and place in question or issue."

The Trial Judge endorsed the Charge in writing "Const" (R:238) and agreed to cover the substance in the general charge before the jury, but failed to do so.

The **MOORE** OPINION, at 986, states:

> "... appellant's contention that the trial court improperly refused the preserved written requested charge is without merit:
>
> "The refusal of a charge, though a correct statement of law, shall not be cause for a reversal if it appears that the same rule of law was substantially and fairly given ..." Ala. Code 12-16-13 (1975).

> "We have reviewed the refused charge and find that it was fully covered in the court's oral charge ..."

The OPINION stands in plain error, unsupported by the Record. Nowhere did the Trial Judge charge the essence of Defendant's request.

Because Defendant's evidence tended to show that the drugs were most probably possessed by her husband, she was lawfully entitled to have the jury charged in accord with her Instruction NO.2.

(2)

The Trial Judge, well knowing Defendant's husband had been previously convicted for narcotics possession on the same evidence shown by the State, refused in writing to instruct on Defendant's requested Charges 3 and 4, respecting "duress of coverture", and the relation of husband and wife, a rule of law indispensible to the defense.

Defendant's Charge NO.3 (R:221), in pertinent part reads:

> "... if the jury find ... that the accused is the wife of Timothy Moore ... convicted of possessing the things ... in this Indictment ... then the jury may

> acquit the accused ... if the accused was present ... solely because of the relationship of husband and wife and for no other purpose."

The Record (R:221) shows the Trial Judge wrote "REFUSED 3" on the face of the written Charge, and did not instruct on its content.

Defendant's Charge NO.4 (R:221, in pertinent part reads:

> "... if the jury find ...that the accused was the wife of Timothy Moore at the time and place in question then the jury must presume that the things pproscribed in this indictment must be presumed to have been possessed by the husband and not the wife and the jury may acquit the accused."

The Record (R:221) shows the Trial Judge wrote "REFUSED" - "Offense of possession of illegal drugs is susceptible of joint commission" on the face of the written Charge, and did not instruct on its content.

(3)

The Alabama Court of Criminal Appeals held that Defendant's requested and refused charges were not "preserved for our review pursuant to **ALLEN v STATE** 414 So.2d 989 (Ala.Cr.App. 1981), affirmed, 414 So.2d 993 (Ala. 1982)."

Petitioner contends that **ALLEN** opinion, as applied by the Alabama Courts to deprive her of the right to the requested jury instructions, is unconstitutional.

THE "AUTOMATIC EXCEPTION" RULE:

The citation of **ALLEN** authority by the Appeals Court directly raises the question of Alabama law, involving the so-called "automatic exception" rule on requested jury charges.

The "automatic exception", as the law of the State prior to **ALLEN** was laid out in Alabama statutes, Act No. 74, Acts of Alabama, 1894-5 page 126, in pertinent part:

> "... on all trials of civil or criminal actions at law it shall not be necessary for the party asking a charge in writing to except to its refusal... but such exception by the party asking the charge in writing shall be presumed, if the charge is refused; ... **provided** the actions and rulings of the trial court are assigned as error in the supreme court." (underline added)

The **ALLEN** opinion, referring to 1975

CODE OF ALABAMA 12-16-13, states at 414 So.2d at 994:

> "This Court, when it adopted the Alabama Rules of Civil Procedure in 1973, superseded the automatic exception statute in **civil cases.** The "automatic exception" statute, nevertheless, still applied in criminal cases, but when the legislature, in its wisdom, adopted Code 1975, 12-16-13 it dropped the automatic exception provision." (underline added)

The Court is claiming that the legislature "dropped" the provision, but did it? First, examine the language of the statute section, CODE 12-16-13:

> "Charges moved for by either party must be in writing and must be given or refused in the terms in which they are written, and it is the duty of the judge to write "given" or "refused" as the case may be, on the document and sign his name thereto, which thereby becomes a part of the record."

It must be self-evident that the legislature intended to preserve the record by showing definitively those requested charges "given" and those "refused". Nowhere in the language of the statute does express any intention of repealing the protection of the written

"refusal", for the record.

The Chief Justice of the Alabama Supreme Court, whose dissenting opinion in ALLEN, at page 996, 997 was shared by three other justices, holds that the "automatic exception" WAS NEITHER REPEALED NOR NULLIFIED:

> "I respectfully dissent. While it is true, as stated by the majority that the reference to the automatic exception was omitted from CODE 1975, 12-16-13, a review of the legislative history surrounding that and other sections fails to demonstrate an intent on the part of the Legislature to abolish the automatic exception rule in criminal cases. (at 996)
>
> "These questions and responses show the concern of the Legislature as to retaining the provision for use in criminal cases. (at 997)
>
> "Cases decided since the enactment of Code 1975 have also recognized that the automatic exception is still in effect for criminal cases. (at 997)

This Court may notice the due process failure, of any "rule" demanding cumulative objections, especially when the rule is "promulgated" solely by the Alabama Courts without legislative authority, entirely outside the language

or intent of the statute itself.

When the Court "rule" forces Defense Counsel TO PROPOSE INSTRUCTIONS IN WRITING, then undergo written "REFUSAL" by the Judge, and even after the Defendant's instructions are refused in writing for the Record, to make still another "EXCEPTION" for "the Record"; the "rule" must be unconstitutional.

There is no "compelling State interest" big enough to burden criminal defendants in this manner. The majority opinion in **ALLEN** must be repugant to the due process clause and the equal protection clause of the Fourteenth Amendment, and is due to be set aside by this Court.

In the face of the plain record that defense counsel submitted requested instructions in writing, according to the law of CODE 12-16-13; and in the face of the plain Record, showing that he Trial Judge wrote "refused" IN WRITING"; the

OPINION of the Alabama Court in **MOORE** is and must be unconstitutional and plainly erroneous, when it effectively denies Defendant relief for a pretended failure to "preserve the record".

(4)

"COVERTURE" INSTRUCTIONS CRITICAL

The Court may notice the critical nature of the "duress of coverture" defense here, where the husband had been previously and independently convicted of "possession" of the identical illegal drugs.

The defense showed that Timothy and Jayne were husband and wife (R159), that she was a Christian woman, actively pursuing a religious life (R171), that she was in "subjection to her husband" (R:175), and that in their marriage, Timothy made the decisions (R:171) and Jayne's attitude was one of acquiescence (R:175).

No facts were shown to controvert

this testimony, which was elicited to support the "duress of coverture" legal defense asserted by Counsel for the Defendant.

The unsubstantiated "legal" premise expressed by the Trial Court that the "offense of possession of illegal drugs is susceptible of joint commission" (R:221) is hardly sufficient to deprive the Defendant of the "coverture" instructions, based on the husband-wife relationship.

If facts were present to prove "joint" commission of the offense, then what harm could come from the "coverture" instructions?

Conversely, when her sole defense was obliterated by the Court's refusal to properly instruct the jury, how can it be pretended that her constitutional rights were protected?

LEGAL AUTHORITY ON COVERTURE:

There was ample authority before the

Trial Court that the "coverture" defense was viable under Alabama law. Defense Counsel presented xerox copies of **STROUSE v LEIPF** 14 So. 667 (1894) and **BRAXTON v STATE** 82 So. 657 to the Court, directly in connection with the requested jury charges.

Additionally Defendant's MOTION FOR A NEW TRIAL cited appropriate federal and constitutional authority on the husband and wife relationship, explaining the wife's innocent presence.

The Appeals Court, likewise, had copious authority, such as:

STROUSE v LEIPF, 14 So 667 (1893):

> "The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands." (At 439)

The common theme throughout the **STROUSE** Opinion is that the husband decides where the domicile of the wife

shall be, and the law even excuses her from crimes, if any, committed by her in the presence of her husband. See **STROUSE** at 442:

> "The doctrine of the common law is, that by marriage the husband and wife become one person in law; that she is under his protection, influence, power and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term coverture. One effect of it is, . . . to excuse her from punishment for crimes committed by her in the presence of her husband, on the ground that she acted under his compulsion. He alone is held responsible for such crimes."

Continuing, later, in **STROUSE**, at p. 443, Chief Justice Stone quotes from **Cooley on Torts**, Section 115, to wit:

> "There is a presumption", says Judge Cooley, 'corresponding to that which is made in the criminal law, that if a wrong is committed by the wife in the presence of the husband, it must have been committed by his consent and under his influence, and consequently, is his wrong rather than that of the wife, and should be redressed in a suit against him alone. But any such presumption is liable to be overthrown by evidence.'"

The North Carolina Supreme Court agrees in principle, stating in **STATE** v **BAXTER**, 208 SE2d 696 (1974), at p. 698:

". . . a man residing with his wife in an apartment, no one else residing or being present therein, may be deemed in constructive possession of marijuana located therein, not withstanding the fact that he is temporarily absent from the apartment and his wife is present therein."

The Georgia Court of Appeals in **LANDERS v STATE**, 152 SE2d 431 (1966), also states, at p. 431:

"When husband and wife reside together, he is the head of the house, whether it be owned by or be rented to the one or the other."

In **ARELLANES v U.S.** 302 Fed 603 (1962), at p. 606, we find:

"On the other hand, mere proximity to the drug, mere presence on the property where it is located or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession."

Continuing with **ARELLANES**, supra, the Court said, at p. 606:

". . . the government states that 'where the narcotics were, there also was Geneva Arellanes'. We cannot view this as a conclusively incriminating circumstance because the presence of the narcotics is also exactly coincidental with the presence of her husband, and Mrs. Arellanes presence with both is as fully explained by her attachment to her husband as it might be by a control over the drugs"."

In **U.S. v DiNOVO**, 523 F2d 197 (1975), the reiterates quotations from **ARELLANES**, supra, and states at p. 201:

> "Janet DiNovo was not discovered in the immediate area of unconcealed narcotics. Thus her contructive possession must be justified on the basis of her possessory interest in the trailor. There was no evidence to show that she owned the trailor."

Contrasting mere presence with "possession" of illegal drugs, in the case of **U.S. v VALENZUELA**, 596 F2d 824, at p. 831, the Court of Appeals stated:

> "In the present case, . . . Berdardina's mere joint occupancy of the house is at best equivocal, and is not alone sufficient to support her conviction of possession. Also see Arellanes "because the presence of the narcotics is also exactly coincidental with the presence of her husband".

Unquestionably the Defendant Jayne Moore was entitled to carry an affirmative defense based on the husband-wife relationship, and was entitled to have the duress of coverture explained to the jury. It was plain error to deprive her of that right.

QUESTION

III.

JUDGMENT OF ACQUITTAL

NO PRIMA FACIE CASE

Was the Motion to Acquit for failure to make a prima facie case on illegal posession of drugs, based on circumstantial evidence, due to be granted?

The Record shows that the Defendant moved for acquittal at the end of the State's case (R:153), and that the Court dictated an ORDER (R:153) denying the Defendant's Motion. The ORDER is set out in full as APPENDIX "A" with this Petition.

The Trial Court failed to follow the simple four part standard governing "Rule 29" Motions for Judgment of Acquittal in federal courts. The standard fully protects the legitimate interests of the

defendant with no prejudice to the prosecution.

Fulfillment of any one test should merit acquittal. Petitioner maintains that she was entitled to acquittal by any test.

See **VIRGINIA LAW REVIEW** Vol. 58, Number 5, May 1972 "CONSTRUCTIVE POSSESSION IN NARCOTICS CASES", at 776:

> **"Four different tests exist for guiding a judge's decision** whether or not to grant a directed verdict of acquittal. Fed. R. Crim. R. 29 suggests:
>
> 'Is the prosecutor's evidence sufficient to convict?
>
> A second calls upon the judge to grant the motion unless the evidence was sufficient to exclude 'every other reasonable hypothesis' than guilt. (cite)
>
> Another ... substantial evidence of the charge avoids a directed verdict (cite)
>
> Finally, 'If the evidence is such that reasonable jurymen must necessarily have a reasonable doubt, the judge must require acquittal ...' (cite)"

The article concludes, in footnote at 767:

> "Under any of these standards for directing a verdict of acquittal, failure of the State to prove one of the required factors should justify removing the case

from the jury."

(1)

SUFFICIENT EVIDENCE TEST

The Record shows that proximity and non-exclusive residency in the trailer was shown; nothing else. The law is clear any culpability of the husband, does not evidence criminal conduct by the wife.

See **LANDER v STATE** 114 Ga. 687, 152 S.E.2d 431, 432 (1966)[9] where the Georgia Supreme Court holds:

> "If a husband and a wife live together, the husband is the head of the house and therefore any contraband found on the premises are presumed to be his, even if there are no other corroborating circumstances. This was true even though the title to the real estate was in the wife's name."

As a matter of law, non-exclusive possession is insufficient to convict for the offenses here charged. See **STATE v McGEE** 473 S.W.2d 686 (Mo. 1971)[10]:

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[9] As reported in **LAND AND WATER REVIEW** Vol. IX, at 247.

[10] **LAND AND WATER REVIEW**, supra, 247.

> "The defendant's proximity to the contraband and his non-exclusive possession of the area where it was found is not sufficient to sustain ... conviction."

The State of Alabama has adopted the "non-exclusive possession" rule. See **PARKS v STATE** 46 Ala.App. 722, 248 So.2d 762 (Ala.Cr.App. 1971). The defendant, Parks, was apprehended in an automobile, driven by another person, which left him in "non-exclusive" occupancy or "Control" of the car. The illegal drugs were found in "plain view"[11] in the car, yet the Court held Parks to be innocent of any wrongdoing:

> "There was no ... incriminating statement, nor evidence of attempted flight... In our opinion, mere presence of a defendant in an automobile is not sufficient to establish the requisite knowledge of the presence of drugs or to prove defendant guilty of aiding or abetting in the illegal possession."

Similarly, in Jayne Moore's case, there was no "incriminating statement" nor any "evidence of flight".

---

[11] According to the Court.

See **EVANS v UNITED STATES** (CA9 1958) 257 F2d. 121, cert den 358 U.S., reh den 79 SCt 221, which held:

> "where the defendant is in non-exclusive possession of premises on which illicit drugs are found, it cannot be inferred that he knew of the presence of such drugs **and had control of them**, unless there are other incriminating statements or circumstances tending to buttress such an inference."[12] (emphasis added)

Contrast the decision approving acquittal in **PARKS**, with the Record and OPINION here. Here the Court allowed mere presence in a place alleged to be her residence, with nothing more, to constitute "possession". See **Moore** at 986:

> "we can only consider that evidence which was before the trial judge at the time the motion to exclude was made. (cites)
>
> "Guilty knowledge of the presence of the illegal substance may be established by circumstantial evidence. (cites)
>
> "While mere proximity to contraband is not enough to establish constructive possession, **where other circumstantial evidence ... is sufficiently probative,**

---

[12] 56 ALR3d 948, 957.

proximity to contraband coupled with inferred knowledge of its presence will support a finding of guilt on such charges. (cites)" (emphasis added)

"Where as here, the presence of the accused at the scene is established, by both direct and circumstantial evidence, and the **evidence of the accused's knowledge of the presence** of the prohibited substance is shown **together with other incriminating evidence**, the issue of the defendant's guilt should be submitted to the jury. (cites)"

"A thorough review of the evidence in this case, and the authorities on this point convinces us that this was a question for the jury in this case."

Where from the face of the Record before the Trial Judge at the time of the Motion to Acquit (R:153), is the "other circumstantial evidence" "sufficiently probative" to "support a finding of guilt" on such charges?

The Trial Judge cites no such "other evidence" at all in his ORDER (R:153) and there is none.

Although the Appeals Court may have "reviewed" the "evidence", they failed to cite a single culpable "act" by Defendant, to allow an inference to be

drawn that the drugs were under her truthfully under her "dominion" or "control".

See **GARSED v STATE** 51 Ala.App. 622, 288 So2d 161 (1973):

> "... defendant's mere presence will not support conviction of possession of marijuana **absent some act** showing dominion or control." (emphasis added)

The State of Alabama has simply parlayed mere presence and residency into an inference of "possession", allowing the jury to consider and convict purely on speculation and conjecture.

See **COOK v STATE** 341 So2d 183, at 184:

> "no one testified that the appellant and his family were ever at the residence other than the afternoon of the search. There was no testimony that the appellant had any knowledge of or connection with the contraband found by the police."

WHARTON'S CRIMINAL EVIDENCE "Burden and Degree of Proof" Section 17 "Corpus Delecti" defines the substance of a crime as containing an element of "the unlawfulness of some person's conduct."

There was no evidence of unlawful "conduct" on the part of Jayne Moore.

No such "conduct" was cited or advanced in support of the Appeals Court's quotations of "law", the legal maxims stated to rationalize conviction, because the record shows NO ILLEGAL CONDUCT.

The Alabama Court overlooked two simple, controlling legal maxims, common to narcotics cases. The maxims are:

FIRST: "Proximity" PLUS "non-exclusive possession" DOES NOT EQUAL "guilty knowledge".

SECOND: "Constructive possession" MINUS "guilty knowledge" DOES NOT EQUAL CRIMINAL CONDUCT.

By any maxim, or any rule of law, Jayne Moore was innocent, according to the "evidence" shown. There was no "substantial evidence" to allow her conviction.

FAILURE ON PROOF OF CONSTRUCTIVE

POSSESSION

When "constructive possession", standing alone will not allow conviction, how can the State allow conviction LACKING PROOF OF EVEN CONSTRUCTIVE POSSESSION?

See **VIRGINIA LAW REVIEW** Vol. 58, 751 (1972) at 761:

> "Constructive possesion is a legal fiction used by courts to find possession in situtations where it does not in fact exist, but where they nevertheless want an individual to acquire the status of a possessor."

RADKE v STATE 42 Ala.App. 397, 293 So.2d 312, aff'd 292 Ala. 290, 293 So.2d 314, holds that "constructive possession" can be established only upon a showing of:

(1) actual or potential physical control;

(2) intention to exercise dominion; and,

(3) external manifestation of intent and control.

The Court will notice that no finding was made in any Court below, based on

"SUBSTANTIAL EVIDENCE", that Jayne Moore showed any **intention to exercise dominion** or that there was any **external mainfestation of intent and control.**

Hence the proof of even "constructive possession" failed.

Who can explain this serious error of the Alabama Courts, when a helpless woman is sentenced to ten years in prison, based on nothing but evidence of (1) actual or potential physical control, and completely lacking any evidence of the other two attributes absolutely necessary to establish even "constructive possession"?

(2)

OTHER REASONABLE HYPOTHESIS TEST

Can the evidence shown in the State's case in chief be held sufficient to exclude "every other reasonable hypothesis than guilt", thus allowing the case to go to the jury. The evidence clearly showed that the Defendant was

married to a man previously convicted for illegal possession of the very same drugs, seized at the same time, AND THOSE SAME DRUGS were used in evidence against her, at her own separate trial.

THE OTHER REASONABLE HYPOTHESIS IS GLARING.

That hypothesis is the innocent spouse hypothesis, fortified by the legal premise that "proximity" plus "non - exclusive possession" does not equal guilty knowledge, and laid on a foundation of the evidentiary presumption of innocence, NONE OF WHICH HAVE BEEN REPEALED IN DRUG CASES.

The hypothesis is THAT THE HUSBAND WAS THE ONE WHO HAD "DOMINION", as well as "control" over both the premises where the two allegedly resided, and "control" over the illegal drugs. The existence of such a hypothesis is indisputable, and the Defense Counsel ably laid the foundation for it by his cross -

examination, and objections during the State's case in chief.

The Trial Court committed compounded error which fatally prejudiced the Defendant:

First by denying the Motion to Acquit, based on the alternative "reasonable hypothesis" and

Second by failing, sua sponte, to instruct on the existence of that "other reasonable hypothesis" once he denied the Motion to Acquit, and ruled that the "question of ... constructive possession is one for the jury." (R:154)

IT WAS THEREFORE, PLAIN ERROR TO ALLOW THE JURY TO CONVICT ON NOTHING BUT CIRCUMSTANTIAL EVIDENCE, thus compounding the plain error committed by the Trial Court's denial of the Motion to Acquit (R:153).

There was no evidence, either circumstantial or direct, that Jayne Moore ever actually "exercised" any

independent personal dominion or control over either the drugs or the premises, either "jointly" with her husband, or independently, as to her.

Surely the "other reasonable hypothesis" of the faithful, but innocent wife, entitled the Defendant to acquittal, in the face of a total lack of evidence showing any cuplable "conduct" or "act" to establish "guilty knowledge" for the charge of "possession".

The Courts of Alabama deprived Defendant of her constitutional rights, and that deprivation is due to be corrected by this Court.

(3)
SUBSTANTIAL EVIDENCE TEST

This test for granting the verdict of acquittal, according to the Federal Rules of Criminal Procedure, Rule 29, has been effectively argued in this Petition, and does not need to be re-argued here.

Judicial notice of the lack of

substantial evidence appearing in the OPINION of the Alabama Court of Criminal Appeals, **MOORE**, supra, and in the record, to affirmatively link her with the illegal drugs, is sufficent to merit relief.

There was no substantial evidence beyond her "mere presence" in the light of a contested statement as to "residence", and other statements as to residence which were pure hearsay, duly objected to.

Therefore, it is and must be self-evident that the State's case in chief lacked substantial evidence to support it, and therefore the Motion to Acquit was due to be granted.

(4)
REASONABLE JURYMAN TEST

When a reasonable juryman had no evidence that Defendant was in exclusive or effective possession, "dominion" or "control" of the premises where the drugs

were found, much less the illegal drugs themselves; and had no affirmative link of evidence to establish "guilty knowledge", and if he were made aware of the existing legal presumption of the laws of Alabama,[13] to the effect that it was the husband, not the wife, who was the head of the house;[14] would he not have a "reasonable doubt" that she was guilty?

See **PEOPLE v VILLANUEVA** 220 Cal.App 443, 33 Cal Rptr 811,[15] where it was held that in order to establish unlawful possession of narcotics:

> "it must be shown that the accused had dominion and control over the contraband with knowledge of its presence and narcotic character ..."

Where was the "dominion", based on the evidence, and not on speculation or

---

[13] Grounded in the common law, and Christian history, undergirding the constitutions of State and Nation.

[14] And it is he, not she, who dominion over the premises.

[15] Cited in 56 ALR 3d 948, 959.

conjecture? There was none, if the evidence was to serve as the sole foundation for a conviction of the crime.

Would any man of you allow his wife to suffer conviction in the face of such a doubt?

Surely, then, no "reasonable" juryman could fail to have a reasonable doubt.

Conviction on a criminal offense demands proof to a moral certainty that the Defendant is guilty of the crime, including proof of "guilty knowledge". Where was the proof of guilt or guilty knowledge to a MORAL CERTAINTY?

Therefore, a reasonable juror would have to acquit.

SUMMATION OF ACQUITTAL TESTS:

It appears therefore, that even though just one of the acquittal tests above would be sufficient, according to the sense of Federal Rule 29, the case of the Petitioner here is such that the Petitioner WAS ENTITLED TO ACQUITTAL BY

EVERY ONE OF THE FOUR TESTS.

This Court, having examined the reasons therefore, is due to find that the Petitioner was deprived of right and justice by the failure of the Trial Court to acquit, and the error of the Appeals Court in refusing to direct that proper verdict, on the grounds that the State made no prima facie case.

CONCLUSION

WHEREFORE, Petitioner Jayne Moore, submits that the Writ of Certiorari is due to be granted, and upon final determination of the cause, the Petitioner's conviction in the Montgomery County, Alabama Circuit Court should be reversed.

For the reasons shown hereinabove, and in the interests of justice, and the equal protection of laws, as applied to the Petitioner, a woman who has been unlawfully convicted solely upon evidence of illegal acts by her husband,

Petitioner moves the Court to issue its Writ of Certiorari to the Alabama Court of Criminal Appeals, commanding the Clerk to forward the Record for examination and hearing of the case.

Respectfully submitted

Jayne Moore, Attorney for herself

P.O. BOX 5071
Montgomery, Alabama 36103

AFFIDAVIT OF SERVICE

I, Jayne Moore, first being duly sworn, hereby certify that on this the ___ day of January, 1985, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI on the State of Alabama, Respondent herein, by mailing a copy in a duly addressed envelope, First Class Postage paid, addressed to:

Charles Graddick, Attorney General
250 Administrative Building
64 North Uniion Street
Montgomery, Alabama

_____
JAYNE MOORE

Subscribed and affirmed before me this _____ day of January, 1985

_____
NOTARY PUBLIC
My commission expires _____.

APPENDIX A

HANDWRITTEN BY THE COURT: At the conclusion of the State's case, the Defendant moved for a judgment of acquittal; and for a directed verdict, and to exclude the State's evidence, separately and severally, and as grounds therefor, the defendant states separately and severally that the State has failed to prove a prima facie case; that the State has failed to prove that the defendant ever had any contact with the drugs set forth in the indictment; the State failed to prove the defendant had any contact whatsoever with the trailer or with the other buildings wherein the drugs set forth in the indictment were found.

ORDER

There is an abundance of evidence that drugs, drug paraphanelia and literature were found in a house trailer and an outbuilding at a trailer in

Sellers Station, Montogmery County, Alabama. The evidence showed that the defendant acknowledged to the arresting officer or some of them that this was, in fact, her residence; the evidence shows that the defendant's husband lived in the trailer also; the defendant brought out that the defendant's husband had been convicted of possession of the drugs in question. In the opinion of the Court, the question of possession, a constructive possession, is one for the Jury.

Motions are therefore overruled.

Signed: Joseph Phelps, Judge.

(Record, 153-54)

84-1199

No. 84-.....

Office-Supreme Court, U.S.
FILED
JAN 17 1985
ALEXANDER L. STEVAS
CLERK

.....

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JAYNE KING MOORE, Petitioner

v.

STATE OF ALABAMA, Respondent

A P P E N D I X
TO

Petition for a Writ of Certiorari
To The Alabama Court of Criminal Appeals

A:TRIAL COURT ORDER
B:APPEALS COURT OPINION
C:APPEALS COURT REHEARING DENIAL
D:ALABAMA SUPREME COURT DENIAL OF WRIT

JAYNE KING MOORE, pro se
Attorney for herself

P.O. BOX 5071
Montgomery, Alabama 36103
205 / 262-7381 (days)

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(Record, 153-54)

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APPENDIX B

STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1983-84

3 Div. 914

Jayne King Moore, alias

v.

State

Appeal from Montgomery Circuit Court

TYSON, JUDGE

Jayne King Moore was indicted for violation of the Alabama Uniform Controlled Substances Act, § 20-2-1, et. seq., Code of Alabama 1975. In the first count of the three-count indictment, appellant was charged with the unlawful possession of cocaine. The second count of the indictment charged the appellant with the unlawful possession Diazepam, and the third count charged her with the unlawful possession of marijuana. the jury found the appellant "guilty as

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charged in the indictment" and after a sentencing hearing she was sentenced to ten years' imprisonment.

On the afternoon July 21, 1982, members of the Montgomery City Police Department, the Montgomery Country Sheriff's Department, the District Attorney's office, and the Alabama Bureau of Investigation executed a search warrant for a mobile home and out-buildings in Lapine, Alabama. The search warrant was the result of an undercover operation which was being carried on in Montgomery County. The mobile home and out-buildings were allegedly owned by Tim and Jayne Moore.

Officer Dennis Bodine of the Montgomery Police Department testified that, upon arrival at the residence of Tim and Jayne Moore, he observed the appellant and her husband working on a fence near their mobile home. He stated that a flatbed truck was parked near the

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fence, where the appellant and her husband were standing. He stated that, as the officers entered the property of the appellant, she jumped on a ten speed bicycle and began heading towards the mobile home. He also stated that the appellant's husband started running towards the residence. He stated that the appellant and her husband were stopped before they reached the residence and placed in custody.

Officer Bodine testified that police officers and other law enforcement officials then executed the search warrant. He stated that entry was made into the residence and a large amount of illegal drugs and paraphenalia were found in the mobile home. He stated that several bags of marijuana were found in a brown box on the kitchen counter and he identified such items. He further identified a large number of other items found in the home and outbuildings. Such

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items were (1) a plastic bag containing white tablets, found in the front bedroom of the home; (2) two plastic bags of white powder, found in the front bedroom of the home; (3) two more plastic bags containing white tablets, found in the front bedroom on a counter top; (4) a plastic bag containing a brown substance, found in the front bedroom counter top; (5) a small green box containing marijuana and a white powder, found in the bedroom; (6) a small piece of tin foil with a brown substance wrapped inside, found in closet of bedroom; (7) a bottle of Lactose, found on the counter top in the front bedroom; (8) a small blue dispenser with a white powder inside, found on the front seat of the flatbed truck; and (9) a plastic bag with marijuana in it, found in an outbuilding. He stated that he kept each of these items in his control until he turned them over to Allen Adair at the State

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Department of Forensic Sciences. He stated that these items were tested and returned to him, where they were placed in the drug evidence room of the Montgomery Police Department.

Officer Bodine further testified that a number of other items were found during the search. Such items were (1) a set of counter weights for a scale, found in front bedroom; (2) a brown vinyl carrying case with a set of scales, found on bathroom counter; (3) a blue porcelain water pipe, with a residue in it, found in the closet of front bedroom; (4) a magazine with an article on growing marijuana in it, a Xerox copy of a book entitled "Drug Manufacturing for Fun and Profit," a pamphlet entitled "The Marijuana Consumers and Dealers Guide", a book entitled the "Cocaine Handbook," and a "Fall Harvest Guide," all found in a desk in the living room of the home; (5) a field testing kit; (6) a locker

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containing laboratory glassware which had residue in it, found in an outbuilding; and (7) a box containing a book entitled "Marijuana Grower's Guide," a glass jar with residue inside, a "Deering" sifter used for mixing cocaine, found in the front bedroom.

He stated on cross-examination, when questioned as to why he believed the mobile home to be a residence, that there were clothes in the closets, there were food items in the cabinets and deep freeze.

Allen Adair testified that he was employed as a toxicologist with the STate Department of Forensic Science. He stated that he did an analysis on a number of items turned over to him by Officer Dennis Bodine. He stated that he tested six plastic bags containing plant material, which were located in a brown box. He stated that these contained marijuana. He stated that he tested

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white powder found in a plastic bag and that such powder was Dextrose - a cutting agent for various drugs. He stated that he tested a plant material in a big glass jar and it was marijuana. He stated that he tested 508 white tablets and these tablets were identified as Diazepam - a tranquilizer drug. He stated that he tested two plastic bags containing a white powder and this powder was cocaine. He stated that he tested several more clear plastic bags containing white tablets and these tablets were Diazepam.

Mr. Adair further testified that he tested a brown jar containing a white powder and this powder was Lactose - a growth sugar. He tested a plastic bag containing a brown substance and this substance was identified as hashish. He stated that he tested a plant material and a white powder located in a green box and these substances were identitied as marijuana and cocaine. He stated that he

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tested a brown substance found wrapped in a small piece of tin foil and this substance was hashish. He tested a blue container which had a white powder in it and this powder was cocaine. He tested a green plant material found in a clear plastic bag and this material was marijuana. He also tested two more bags which contained plant material and this was identified as marijuana.

W. J. Walker testified that he was employed by the Montgomery County Sheriff's Department and that he was present when the search was conducted on July 21, 1982. He stated that he found a brown box on the kitchen counter which contained a number of bags with a plant material in them. He stated that he turned this evidence over to Officer Bodine. He further stated that he had been informed that the mobile home was the residence of Tim and Jayne Moore.

On cross-examination, he stated that

he observed women's clothing in the closet of a bedroom in the mobile home.

William Rhegness testified that he was a narcotics agent employed by the Alabama Bureau of Investigation. He stated that he was involved in the search of the appellant's residence on July 21, 1982. He stated that he recovered a small piece of tin foil, which had a brown substance inside it, from a shelf in a closet in the front bedroom. He stated that he found a water pipe, designed for smoking marijuana or hashish, in the same place he discovered the tin foil. He stated that he turned both of these items over to Officer Bodine.

On cross-examnation, he stated that the appellant admitted to him that she lived in the mobile home. He specifically stated that he "recall[ed] asking her name and if she lived there and she told me and affirmed yes she

lived there."

B.G. Bryant testified that he was employed by the District Attorney's office. He stated that he was present during the search of the appellant's residence. He stated that previous to this search, during the course of his investigation, he looked in the Montgomery County phone book and observed that the Moore residence was listed at the address they ended up searching. He further stated that he participated in the search and recovered a blue container, which had a white powder in it, from the seat of the flatbed truck. He stated that he turned this over to Officer Bodine.

N.W. Ward testified that he was employed by the Montgomery County Sheriff's Deprtment. He stated that he participated in the search of the appellant's residence and found a number of items which he turned over to Officer

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Bodine. Among the items he recovered from the front bedroom of the mobile home were (1) a book entitled "Marijuana Grower's Guide;" (2) a big glass jar which had marijuana in it; (3) a bag of pills; (4) a set of weights for a triple beam scale; (5) a plastic bag containing a white powder; (6) a bag of 452 pills which was in plain view on the counter top; (7) a bottle of Lactose on top of a counter; (8) a container with white powder in it. He also found a set of scales in the bathroom on the counter top. He also searched a desk in the living room of the mobile home and found a number of drug related books.

Officer Ward testified that he noticed a mailbox across the road from the driveway and this mailbox had "Moore" on it.

Ken Halford testified that he was employed by the Alabama Bureau of Investigation and that he participated in

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the search of appellant's residence on July 21, 1982. He testified that he found women's lingerie in the mobile home. He also testified that he found a greenhouse setup in an eighteen wheel-trailer, which was located beside the mobile home. He further stated that one Bob Robertson - a suspect in the drug investigation - told him that Tim and Jayne Moore lived in the mobile home.

The State rested its case at this point and the appellant moved for a judgment of acquittal and to exclude the State's evidence.

I

The appellant contends that the trial court erred in overruling his [sic] motion to exclude because the State failed to prove a prima facie case.

In considering the question of whether the trial judge properly overruled that motion, we can only consider that evidence which was before

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the trial judge at the time the motion to exclude was made. Williams v. State, 340 So.2d 1144 (Ala. Crim. App.), cert denied, 340 So.2d 1149 (Ala. 1976).

For unlawful possession of a controlled substance, it is not necessary to prove manucaption, but constructive possession may be shown, and where such possession is relied upon, the State must also prove beyond a reasonable doubt that the accused knew of the presence of a prohibited substance. Riggirs v. State, 437 So.2d 631 (Ala. Crim. App. 1983); Jones v. State, 432 So.2d 5 (Ala. Crim. App. 1983); Yarbrough v. State, 405 So.2d 721 (Ala. Crim. App.), cert. denied, 405 So.2d 725 (Ala. 1981); Green v. State, 384 So.2d 1215 (Ala. Crim. App. 1980); McHellen v. State, 351 So.2d 689 (Ala. Crim. App. 1977); Daniels v. State, 49 Ala. App. 654, 275 So.2d 169 (1973). Guilty knowledge of the presence of the illegal substance may be established by

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circumstantial evidence. Jones v. State, supra; Yarbrough v. State supra; Mitchell v. State, 395 So.2d 124 (Ala. Crim. App. 1980), cert denied, 395 So.2d 127 (Ala. 1981); Green v. State, supra; McHellen v. State, supra; Henderson v. State, 347 So.2d 540 (Ala. Crim. App.), writ quashed, 347 So.2d 547 (Ala. 1977); Parks v. State, 46 Ala. App. 722, 248 So.2d 761 (1971). Since the possession of illegal drugs is susceptible of joirt commission, the guilt of the accused does not necessariliy depend upon proof of her ownership of the drugs. Mitchell v. State, supra; McCord v. State, 373 So.2d 1242 (Ala. Crim. App. 1979); Henderson v. State, supra; Holley v. State 447 So.2d 829 (Ala. Crim. App. 1983).

"While mere proximity to contraband is not enough to establish constructive possession, where other circumstantial evidence ... is sufficiently probative,proximity to contraband with

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inferred knowledge of its presence will support a finding of guilt on such charges" German v. State, 429 So.2d 1138 (Ala. Crim. App. 1982); United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979). When the presence of the accused at the scene is established and evidence of his knowledge of the presence of the illegal substance is shown - even by circumstantial evidence- along with any other incriminating evidence, the issue of the appellant's guilt should be submitted to the jury. Riggins v. State, 437 So.2d 631 (Ala. Crim. App. 1983), German v. State, supra; Collier v. state, 413 So.2d 396 (Ala. Crim. App. 1981), affirmed, 413 So.2d 403 (Ala. 1982); Radke v State, 292 Ala. 290, 293 So.2d 314 (1974). "If presence at the time and place a crime is committed, in conjunction with other facts and circumstances tend to connect the accused with the commission of the crime, then

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the jury may find the accused guilty" German v. State, supra; Dolvin v. State 319 So.2d 133 (Ala. 1980).

In this case there is no argument with the proposition that where drugs were found on the premises under control of the appellant an inference may arise that the appellant had knowledge and possession of them. The particular difficulty in this case is whether there was sufficient evidence of the appellant's control of the premises to authorize an inference of her knowledge and constructive possession of the drugs found on those premises. The appellant argues that evidence of control was insufficient because there was no evidence that she was ever physically present in the mobile home. A thorough review of the evidence in this case, and the authorities on this point, convinces us that this was a question for the jury

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in this case. "Where, as here, the presence of the accused at the scene is established by both direct and circumstantial evidence, and the evidence of the accused's knowledge of the presence of the prohibited substance is shown together with other incriminating evidence, the issue of the defendant's guilt should be submitted to the jury." Henderson v. State, 347 So.2d 540 (Ala. Crim. App.), writ quashed, 347 So.2d 547 (Ala. 1977); Fields v. State, 333 So.2d 861 (Ala. Crim. App. 1976). Moreover, a showing that there is a reasonable probability of unlawful possession of narcotics by someone is sufficient to establish the corpus delecti of the crime of possession. It is not necessary to prove the accused's connection with the drugs to prove the corpus delecti. Lafitte v. State, 370 So.2d 1108 (Ala. Crim. App.), cert. denied, 370 So.2d 1111 (Ala. 1979); Reynolds v. State, 346

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So.2d979 (Ala. Crim. App.), cert. denied, 346 So.2d 986 (Ala. 1977).

The appellant further argues that her admission of living at the trailer was in violation of her Miranda rights. This testimony was elicited by appellant's own counsel during cross-examination of Officer Rhegness and was not objected to during trial. As a result, such argument has not been preserved for our review. This court may only review rulings of the trial court that are adverse to the appellant. Moreover, error cannot be predicated upon admission of testimony which is elicited by defense counsel and is responsive to defense questions. Williams v. State, 383 So.2d 547 (Ala. Crim. App. 1979), affirmed, 383 So.2d 564 (Ala. 1980), cert. denied 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980).

A review of the evidence in this case reveals that the trial judge did not err in overruling the appellant's motion to

exclude the State's evidence.

II

The appellant contends that the trial court erred in allowing the prosecutor to proceed in a manner that was prejudicial to her.

In her brief the appellant notes a large number of instances where the prosecutor made comments or asked questions and she contends such questions and comments were prejudicial to her. She also argues that several comments made by the prosecutor during opening and closing statements were improper and prejudicial. It should be noted that the appellant's trial counsel did not object to a number of the questions she claims were prejudicial and, while he did object to several other questions and comments, he did not invoke a ruling by the trial court. As regards appellant's complaint about improper closing argument, we have carefully examined such argument and find

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the appellant's contention to be without merit. While in argument to the jury, counsel may not argue as a fact that which is not in evidence, nevertheless he may state or comment on proper inferences from the evidence and may draw conclusions from the evidence based upon his own reasoning. Sanders v State, 433 So.2d 348 (Ala. Crim. App. 1982); Speigner v State, 369 So.2d 39 (Ala. Crim. App.), cert. denied, 369 So.2d 46 (Ala. 1979); Liner v State 350 So.2d 760 (Ala. Crim. App. 1977). The prosecutor, as does defense counsel, has a right to present his impressions from the evidence. Sanders v State, supra; Hayes v State, 395 So.2d 127 (Ala. Crim. App. 1980), cert. denied, 395 So.2d 150 (Ala. 1981); McQueen v State, 355 So.2d 407 (Ala. Crim. App. 1978). He may argue every legitimate inference and may examine, collate, shift and treat the evidence in his own way. Sanders v State,

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supra; Hayes v State, supra; McQueen v State, supra.

Furthermore, in this case appellant's counsel did not object to any of the statements relied upon by appellant. "Generally, improper argument is not a valid ground for motion for a new trial or subject to review on appeal, unless there is timely and specific objection by counsel or motion to exclude, an adverse ruling thereon by the trial court, or refusal of the trial court to make a ruling, and an objection thereto." Thomas v State, 440 So.2d 1216 (Ala. Crim. App. 1983); Trawick v State, 431 So.2d 574 (Ala. Crim. App. 1983); Lawson v State, 377 So.2d 1115 (Ala. Crim. App.), cert. denied, 377 So.2d 1121 (Ala. 1979).

We have carefully reviewed the questions and comments of the prosecutor during the trial of the case. As stated above, the complained of questions were not objected to at the trial level, or

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there was no ruling invoked by the appellant's counsel. Our review on appeal is limited to maters on which rulings have been invoked at trial court. Robinson v State, 441 So.2d 1045 (Ala. Crim. App. 1983); Cowgill v State, 426 So.2d 517 (Ala. Crim. App. 1982); Whorton v State, 422 So.2d 812 (Ala. Crim. App. 1982); Wood v State, 416 So.2d 794 (Ala. Crim. App. 1982); Parker v State, 406 So.2d 1036 (Ala. Crim. App.), cert. denied, 406 So.2d 1041 (Ala. 1981). Moreover, in the absence of a ruling, a request for a ruling, or an objection to the court's failure to rule , there is nothing preserved for appellate review. Stewart v State, 398 So.2d 369 (Ala. Crim. App.), cert. denied, 398 So.2d 376 (Ala. 1981); Magro v State, 384 So.2d 871 (Ala. Crim. App.), cert. denied 384 So.2d 875 (Ala. 1979); Cook v State, 369 So.2d 1251 (Ala. 1979). The trial court did not err on this point.

III

The appellant argues that the trial court erred in overruling her motion for a new trial and assigns several reasons therefor.

A

She argues that the trial court erred in failing to exclude the items which were seized from the residence.

The Alabama Supreme Court has held that the admission of various items of drug "paraphenalia" is permissible in order for the State to show the complete story. Furthermore, evidence of other drugs and paraphenalia seized in the search of defendant's home, but not encompassed in the charge against the defendant, is admissible to show the whole story. Beasley v State, 408 So.2d 173 (Ala. Crim. App. 1981), cert. denied, 408 So.2d 180 (Ala. 1982); Casey v State, 406 So.2d 1029 (Ala. Crim. App.), cert denied, 406 So.2d 1036 (Ala. 1981); Reed

v State, 401 So.2d 131 (Ala. Crim. App.), cert denied, 401 So.2d 139 (Ala. 1981); Green v State, supra; McHellen v State, supra; Brantley v State, 55 Ala. App. 493, 317 So.2d 337 (1974), reversed, 294 Ala. 344, 317 So.2d 345 (1975), on remand, 55 Ala. App. 717, 317 So2d 347, cert. denied, 294 Ala. 346, 317 So.2d 348 (1975).

In this case the officers were searching under a valid search warrant and the execution of such warrant was proper. Under these circumstances the evidence seized was admissible as evidence of the crime for which the appellant was convicted. See Baty v State, supra. Moreover, the State properly showed a complete chain of custody for each item seized and entered into evidence. See Sturdivant v State, 439 So.2d 184 (Ala. Crim. App. 1983); Riggins v State, 437 So.2d 631 (Ala. Crim. App. 1983); Luster v State, 433

So.2d 481 (Ala. Crim. App. 1983); Congo v State, 409 So.2d 475 (Ala. Crim. App. 1981), cert. denied, 412 So.2d 276 (Ala. 1982); Holley v State 447 So.2d 829 (Ala. Crim. App. 1983).

B

The appellant further argues that the trial court should have granted her a new trial because the jury returned a general verdict which did not refer to any specific controlled substance for which she was charged with possessing. She was charged in a three count indictment with the possession of three separate drugs. It is the rule in Alabama that a general verdict of guilty on a multiple count indictment is valid where the evidence would sustain the verdict of guilty under one or more counts and the sentence imposed is no greater than could have been imposed on any one of the counts. In this case the evidence was sufficient to find a verdict of guilty on each count

in the indictment. Furthermore, the appellant was sentenced well within the limits for the offense.

C

The appellant also contends that the trial court should have conducted a perjury hearing as to a particular State's witness and failure to do so was error. She contends that she never made a statement to Officer Rhegness, or to anyone, about living in the mobile home.

In order to obtain a new trial on the basis of the use of perjured testimony by the State, a defendant must allege and prove (1) that the testimony was perjured; (2) that it was on a matter of such importance that the truth would have prevented a conviction; (3) that the State had knowledge that the testimony was perjured; and (4) that the defendant was not negligent in discovering the falsehood and in raising the issue. Waldrop v State, 448 So.2d 490 (Ala.

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Crim. app. 1984); Phelps v State, 439 So.2d 727 (Ala. Crim. App. 1983); Pennington v State, 420 So.2d 845 (Ala. Crim. App. 1982); Barnes v State, 415 So.2d 1217 (Ala. Crim. App. 1982); Summers v State, 366 So.2d 336 (Ala. Crim. App. 1978), cert. denied , 366 So.2d 346 (Ala. 1979). In the present case the appellant failed to satisfy this burden of proof. The trial court did not err in denying the motion for new trial on this point.

Moreover, a decision on a motion for a new trial rests largely within the discretion of the trial court, and, in reviewing such a decision, the appellate court will indulge every presumption in favor of the correctness thereof. Ward v State, 440 So.2d 1227 (Ala. Crim.App. 1983).

IV

The appellant contends that the trial court erred in refusing several of her

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requested written requested charges. However, only one of these refused charges has been preserved for our review pursuant to Allen v State, 414 So.2d 989 (Ala. Crim. App. 1981), affirmed, 414 So.2d 993 (Ala. 1982). The appellant's contention that the trial court improperly refused the preserved written requested charge is without merit.

> "The refusal of a charge, though a correct statement of law, shall not be cause for a reversal if it appears that the same rule of law was substantially and fairly given to the jury in the court's general charge or in charges given at the request of the parties."

Ala. Code 12-16-13 (1975). See Campbell v State, 423 So.2d 284 (Ala. Crim. App. 1982); Lambeth v State, 380 So.2d 923 (Ala. 1979); Williams v State, [Ms. 8 Div. 940, January 31, 1984], ___ So.2d ___ (Ala. Crim. App. 1984).

We have reviewed the refused charge and find that it was fully covered in the trial court's oral charge to the jury.

Therefore, there is no basis of error to reversal on this issue.

V

The appellant contends that the trial court's consideration of a pre-sentence report on her constituted a denial of due process because it consisted of "a pack of lies". She contends that the report contained false accusations and that her attorney challenged such report at the sentencing hearing. This court is bound by the record and not by allegations or arguments in brief reciting matters not disclosed by the record. Eaton v State, 423 So.2d 352 (Ala. Crim. App. 1982); Harris v State, 420 So.2d 812 ((Ala. Crim. App. 1982); Hollins v State, 415 So.2d 1249 (Ala. Crim.App 1982). There is nothing in the record before us which supports the claim of the appellant.

The judgment of the trial court is due to be and is hereby affirmed.

AFFIRMED. All the judges concur.

APPENDIX C

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1983-84

3 Div. 914

Jayne King Moore, alias

v.

State

Appeal from Montgomery Circuit Court

REHEARING DENIED

August 14, 1984

APPENDIX D

THE STATE OF ALABAMA-JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

October 19, 1984

83-1333

EX PARTE: JAYNE KING MOORE

PETITION FOR WRIT OF CERTIORARI

(Re: Jayne King Moore, alias v State)

CRIMINAL APPEALS 3/914

CERTIFICATE OF JUDGMENT

WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Costs taxed to petitioner.

JONES, J. - TORBERT, C.J., SHORES, EMBRY AND BEATTY, JJ., CONCUR.

AFFIDAVIT OF SERVICE

I, Jayne Moore, first being duly sworn, hereby certify that on this the ___ day of January, 1985, I served a copy of the foregoing **A P P E N D I X TO** PETITION FOR WRIT OF CERTIORARI on the State of Alabama, Respondent herein, by mailing a copy in a duly addressed envelope, First Class Postage paid, addressed to:

Charles Graddick, Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama

_____
JAYNE MOORE

Subscribed and affirmed before me this _____ day of January, 1985

_____
NOTARY PUBLIC
My commission expires _____.

Office-Supreme Court, U.S.
FILED
FEB 25 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-1199

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JAYNE KING MOORE,

PETITIONER,

V.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

J. ANTHONY McLAIN
SPECIAL ASSISTANT
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ADDRESS OF COUNSEL:

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(205) 262-0336

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ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

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Montgomery, Alabama 36104
(205) 262-0336

QUESTIONS PRESENTED

1. Whether an appellate court should consider allegations of an Appellant which alleged facts are not found in the record on appeal?

2. Whether a trial court must give a defendant's written requested charge on a principle of law in cases where the court's oral charge to the jury has already covered that same principle of law?

3. Whether the evidence of the State of Alabama was sufficient to justify the jury verdict finding the Petitioner guilty of illegal possession of controlled substances?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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STATE OF ALABAMA,

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ON A PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

1. The decision of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction was rendered July 17, 1984. Said opinion is reported as Moore v. State, 457 So.2d 981 (Ala. Cr. App. 1984).

On October 19, 1984, the Alabama Supreme Court denied the Petitioner's petition for a writ of certiorari, without opinion.

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. Section 1254 (1), and Article III, Section 2, of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing her claims under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

Petitioner alleges her claims under Code of Alabama 1975, Sections 12-16-13 and 20-2-70. A copy of that statutory provision is set forth in the Petitioner's brief at pages 2-3.

STATEMENT OF THE CASE

A.

The Petitioner was indicted for violation of the Alabama Uniform Controlled Substances Act, Section 20-2-1. et. seq., Code of Alabama 1975. In the first count of a three-count indictment, Petitioner was charges with the unlawful possession of cocaine. The second count of the indictment charged the Petitioner with the unlawful possession of Diazepam, and the third count charged her with the unlawful possession of marijuana. The jury found the Petitioner "guilty as charged in the indictment" and subsequent to a sentencing hearing the Petitioner was sentenced to ten years imprisonment.

B.

The Respondent would adopt by reference

thereto the facts of this case as set forth in the opinion of the Alabama Court of Criminal Appeals found at 457 So.2d 981.

REASONS FOR DENIAL OF THE WRIT

I.

THE TRIAL COURT'S CONSIDERATION OF THE PRE-SENTENCE REPORT ON THE PETITIONER DID NOT CONSTITUTE A DENIAL OF DUE PROCESS TO THE PETITIONER.

The Petitioner contends that she was denied due process because the trial court considered a pre-sentence report furnished by the probation officer assigned to the Petitioner. The Petitioner also sets out certain facts in her brief which are not contained in the record of the proceedings but only included in assertions of fact not supported by the record. Initially, Respondent would submit that since the facts are not included in the record, those facts being the alleged assertion that the statements in the report were lies and that the trial court then reprimanded defense counsel

for this statement, the issue is not properly before the Court. Harris v. State, 420 So.2d 812 (Ala. Cr. App. 1982).

Further, the Respondent would submit that the argument of the Petitioner is not supported in the law. While it is reconized that with the type of background that the Petitioner has such a pre-sentence report could definitely be prejudicial to her sentencing, such in and of itself is insufficient to indicate a denial of due process. The system of using pre-sentence reports by a sentencing trial court judge has long been a practice in this State. The Petitioner has cited to this Court not case or proposition of law which would support a rejection of this procedure of criminal process as employed in the Courts of Alabama.

II.

THE TRIAL COURT'S ORAL CHARGE TO THE JURY SUFFICIENTLY COVERED THOSE ELEMENTS OF LAW APPLICABLE TO THE CHARGE FOR WHICH THE PETITIONER WAS BEING TRIED.

The Petitioner contends that several different jury charges which she requested were improperly refused by the trial court. However, at the close of the trial court's oral charge, only one of these issues was objected to by defense counsel as not being given. Therefore, the remaining written requested charges may not be reviewed on appeal since they were not properly preserved in the trial court below. Allen v. State, 414 So.2d 989 (Ala. Cr. App. 1981), affirmed, 414 So.2d 993 (Ala. 1982).

As to the issue which was objected to by defense counsel at the end of the trial court's oral charge to the jury, that issue

deals with the presence of the Petitioner at the scene where controlled substances are found as not being sufficient to establish possession.

The specific objection voiced by defense counsel at the trial is as follows:

> "The Defendant feels like, and so requested the Court charge that that particular knowledge must be followed by evidence that other facts and circumstances are involved to establish 'guilty knowledge', that knowledge alone is not sufficient unless it is accompanied by facts and circumstances showing that the Defendant exercised dominion, control, and the intention to do so, equivalent to the fact that it would be a guilty knowledge as opposed to mere knowledge. Mere knowledge would be equivalent to just mere presence." (R. 196).

The Respondent would cite the following exerpt from the trial court's oral charge to the jury:

> "Constructive possession is when you don't actually have it in your hand but you have the power to exercise control, and the intent to exercise that control, and some external manifestation, something positive, something overt, we say, some act that

a person takes towards accomplishing that intent. So, constructive possession, when you don't actually have it in your hand, when you do, however, have the power to possess it, the intent to exercise this possession, and then some act towards accomplishing that intent. The law says some external manifestation. Those three things, coupled with knowledge, coupled with knowledge that the substances are illegal. So, power of dominion and control, actual or potential physical control, intent to exercise this dominion or control, and some external manifestation, some overt act towards the accomplishment of the intent, plus knowledge equals constructive possession. Again, the term possession, which I read to you out of the law, includes constructive possession. Knowledge is not enough. It has to be a power of dominion and control, intent to exercise control, and external manifestation. Knowledge plus that. On the other side, the power, the intent, and the external manifestation is not enough without the knowledge. It takes all four."

The Respondent would submit that the principle of law requested to be charged from by the Respondent was therefore properly covered by the trial court's oral charge and the trial court's refusal of this written requested charge was proper. See

Campbell v. State, 423 So.2d 284 (Ala. Cr. App. 1982).

III.

THE EVIDENCE PRESENTED BY THE STATE WAS SUFFICIENT TO JUSTIFY THE JURY VERDICT FINDING THE PETITIONER GUILTY OF POSSESSION OF THE CONTROLLED SUBSTANCES FOR WHICH SHE WAS CHARGED AND TRIED.

The main allegation of the Petitioner in this regard is that the evidence presented by the State of Alabama was insufficient to make out a prima facie case against the Petitioner in that she was never shown to be in actual possession of the controlled substances which were seized and served as the basis for her indictment and trial. As the trial of this case, it was shown that the Petitioner admitted to one of the law enforcement officials at the scene that she and her husband lived in the trailer in which the controlled substances and paraphernalia were found. She contends

that there is no direct evidence to show her in actual possession of any of the contrclled substances which serve as a basis for her prosecution.

The evidence of the State was to the effect that law enforcement officers went to the home of the Petitioner and her husband with a search warrant. As the law enforcement authorities arrived the Defendant and her husband started for their mobile home trailer. Before reaching the trailer, the Defendant and her husband were apprehended by these law enforcement officials. These law enforcement officials then entered the trailer of the Petitioner and her husband and conducted a thorough search of the trailer and the surrounding premises and the vehicles located thereon. The investigation resulted in the seizure of several items of equipment and materials used in the

processing of illegal drugs. Literature and controlled substances were found in several places in the trailer, the surrounding property, and the vehicles on the property.

Where, the evidence raises a question of fact for the jury and said evidence, if believed, is sufficient to sustain the conviction, the trial court is proper in denying a motion to exclude and allowing the case to proceed for the jury's consideration. Young v. State, 283 Ala. 676, 220 So.2d 843 (1969); Henderson v. State, 347 So.2d 540 (Ala. Cr. App. 1977), cert. quashed, 347 So.2d 543 (Ala. 1977). Further, the possession of the controlled substance by the Petitioner may be established by circumstantial evidence. As set forth in Daniels v. State, 49 Ala. App. 654, 275 So.2d 169 (1973):

"In a prosecution for unlawful possession of narcotics it is not necessary

to prove mancupation but constructive possession may be shown, and where such possession is relied upon the State must also prove beyond a reasonable doubt that the accused knew of the presence of the prohibited substance. (Citations omitted)."

"Such guilty knowledge may be established by circumstantial evidence and guilt does not necessarily depend upon ownership. Parks v. State, 46 Ala. App. 722, 248 So.2d 761."

As to the Petitioner's contention that she was without knowledge of the controlled substances and materials and equipment used for processing of drugs, Respondent would submit that the issue of Petitioner's knowledge of the presence of these items on the premises was a matter which was properly submitted to the jury. Henderson, supra. In the introduction of the equipment and other materials found in conjunction with these drugs was properly admitted by the trial court to show "the complete story concerning the items found within the

residence area." Brantley v. State, 294 Ala. 344, 317 So.2d 345 (1975); Green v. State, 384 So.2d 1215 (Ala. Cr. App. 1980).

The Respondent submits that the facts in the case at bar, when viewed in light of the above-quoted standards of proof necessary in a possession case, are more than sufficient to have allowed submission of the issue to the Petitioner's guilt or innocence to the jury for its decision. See McHellen v. State, 351 So.2d 689 (Ala. Cr. App. 1977).

Based on the facts and authorities set forth above the Respondent would submit that the trial court was proper in allowing submission of this case to the jury and that the evidence was more than sufficient to justify the jury verdict finding the Petitioner guilty. Where the evidence shows the presence of the accused at the scene and

some knowledge of presence of the contraband is shown, along with other incriminating evidence, the issue of guilt is one for the jury. German v. State, 429 So.2d 1138 (Ala. Cr. App. 1982).

CONCLUSION

Based on the foregoing argument the Respondent would submit that the Writ of Certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submitted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

/s/ J. Anthony McLain
J. ANTHONY McLAIN
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

CERTIFICATE OF SERVICE

I, J. Anthony McLain, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the ____ day of February, 1985, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama on the Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Jayne King Moore
P.O. Box 5071
Montgomery, Alabama 36103
(205) 262-7381

/s/ J. Anthony McLain J.
ANTHONY McLAIN SPECIAL
ASSISTANT ATTORNEY
GENERAL OF ALABAMA